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No. 04-116

In the Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,

Petitioner,

v.

INEZ PREECE CAMPBELL AND MATTHEW C. BARNECK, SPECIAL ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF CURTIS B. CAMPBELL,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Utah

BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JAN S. AMUNDSON
QUENTIN RIEGEL
National Association of Manufacturers
1331 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 637-3000

ANDREW L. FREY
Counsel of Record
EVAN M. TAGER
Mayer, Brown, Rowe & Maw LLP
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Counsel for the Amicus Curiae

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INTEREST OF THE *AMICUS CURIAE*

The National Association of Manufacturers ("NAM") is the nation's largest multi-industry trade association representing large and small manufacturers in every industrial sector and in all 50 States.

Because the NAM's members often are the target of lawsuits seeking millions (or billions) of dollars in punitive damages, the proper application of the excessiveness guidelines that this Court articulated in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and clarified in *State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408 (2002) ("*State Farm I*"), is of great importance to the NAM and its members. The Utah Supreme Court's decision on remand constitutes as close to outright defiance of this Court's decision in *State Farm I* as it is possible to come without saying it expressly. If allowed to stand, it will surely embolden other courts to ignore the guidance provided in *State Farm I* and to continue to uphold the kind of large, disproportionate punitive awards that have come to plague American manufacturers. Indeed, regrettably, the Utah Supreme Court is far from alone in failing to take seriously the guidance that this Court provided in *State Farm I*. Accordingly, the NAM submits this brief as *amicus curiae* to urge this Court to summarily reverse the Utah Supreme Court's decision and, in so doing, to condemn once and for all the kind of result-oriented evasions of *State Farm I* that are being practiced by the Utah Supreme Court and other lower courts.[1]

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[1] Both parties have filed letters consenting to any and all *amicus* briefs. No counsel for any party to these proceedings authored this brief, in whole or in part. No other entity or person, aside from the *amicus curiae*, its members, and its counsel, made any monetary contribution for the preparation or submission of this brief. Outside counsel to *amicus*, Mayer, Brown, Rowe & Maw LLP (then Mayer, Brown & Platt), served as co-counsel for petitioner during the post-verdict proceedings and in the

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court no doubt intended its decision in *State Farm I* to send a strong message to lower courts about the need to enforce the procedural and substantive limitations on punitive damages. The decision is rich with guidance to the lower courts, among the most far-reaching of which is the Court's discussion of the second and third *BMW* guideposts. Unfortunately, many lower courts have effectively disregarded this guidance.

For example, although courts by and large have paid heed to this Court's observation that punitive awards rarely should exceed a single-digit multiple of compensatory damages, few have taken to heart the Court's further pronouncements that the historical tradition of double, treble, and quadruple damages remedies is "instructive" and that, when compensatory damages are "substantial," a 1:1 ratio may be the constitutional maximum. The lower courts similarly have invoked a variety of means for avoiding faithful application of the third *BMW* guidepost — notwithstanding this Court's rejection of such evasions in *State Farm I*.[2]

The Utah Supreme Court's decision is perhaps the most striking and prominent — but by no means the only — example of this recurring phenomenon. Accordingly, it is singularly appropriate for this Court to use the present case to

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appeal from the judgment. Mayer, Brown ceased to represent petitioner in this matter in 2001.

[2] Although we focus in this amicus brief on the second and third guideposts, the NAM fully supports State Farm's contention that the Utah Supreme Court's application of the first guidepost is equally indefensible. In particular, by claiming that all five reprehensibility factors identified in *State Farm I* are present in this case, the Utah Supreme Court not only thumbed its nose at this Court's contrary conclusion, but also distorted the reprehensibility criteria to the point where they have lost any usefulness as a constraining force.

provide the additional clarity that the lower courts evidently need.

ARGUMENT

In *State Farm I*, this Court expressed "concerns over the imprecise manner in which punitive damages systems are administered," reiterated its admonition that "punitive damages pose an acute danger of arbitrary deprivation of property," and made clear that reviewing courts must undertake "[e]xacting appellate review" in order to ensure that punitive awards are "based upon an application of law, rather than a decisionmaker's caprice." 538 U.S. at 417-418 (internal quotation marks and alterations omitted). Regrettably, whether out of defiance or confusion, many lower courts have been misapplying (and, in some instances, outright ignoring) the guidance provided in *State Farm I*. Review is necessary to close up the loopholes that the Utah Supreme Court and other lower courts have been opening in disregard of *State Farm I*.

A. Misapplication Of The Ratio Guidepost Is Rampant In The Lower Courts.

In *State Farm I*, this Court undertook to provide lower courts with more detailed guidance regarding the ratio guidepost than it had supplied in previous cases. Specifically, the Court stated that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process"; reiterated that a punitive award of four times compensatory damages generally "might be close to the line of constitutional impropriety"; indicated that, though "not binding," the 700-year-long history of double, treble, and quadruple damages remedies (*i.e.*, ratios of 1:1 to 3:1) is "instructive"; and explained that, although a higher ratio may be permissible when "a particularly egregious act has resulted in only a small amount of economic damages," "[w]hen compensatory damages are substantial, then a lesser ratio, *perhaps only equal to compensatory damages*, can

reach the outermost limit of the due process guarantee." 538 U.S. at 425 (emphasis added). Applying these guidelines to the facts of the case, the Court observed that, even though State Farm's conduct was "reprehensible" and "merit[ed] no praise" (*id.* at 419-420), "a punitive award at or near the amount of compensatory damages" — *i.e.*, a 1:1 ratio — was likely the constitutional maximum. *Id.* at 429.

In the aftermath of *State Farm I*, most lower courts have taken to heart the Court's admonition that double-digit (or higher) ratios will rarely be constitutional. At the same time, however, the great majority of courts have either ignored or sought ways to circumvent this Court's statement that the 700-year legislative history of 1:1 to 3:1 ratios is "instructive" and its admonition that, when compensatory damages are substantial, a 1:1 ratio may be the constitutional maximum.

The present case is illustrative. The Utah Supreme Court acknowledged — as it had to — this Court's observation that "this case 'likely would justify a punitive damages award at or near the amount of compensatory damages.'" Pet. App. 5a (quoting *State Farm I*, 538 U.S. at 429). But it proceeded to rationalize away that guidance on the ground that what this Court really meant is that "[t]he 1-to-1 ratio between compensatory and punitive damages is most applicable where a sizeable compensatory damages award for economic injury is coupled with conduct of unremarkable reprehensibility." *Id.* at 15a-16a. "This scenario," the court said, "does not describe this case." *Id.* at 16a. The Utah Supreme Court also rejected this Court's observation that the $1 million award for emotional distress contained a punitive component and therefore militated in favor of a lower punitive/compensatory ratio, stating: "the trial court's compensatory damages award was purged of elements which may have been more properly placed in the category of punitive damages." *Id.* at 15a.

These rationales for deviating from this Court's suggestion that a 1:1 ratio is the likely constitutional maximum not only improperly disregard square holdings of this Court but also are manifestly wrong as a matter of first principles. To begin with, the statement that a 1:1 ratio is reserved for "conduct of unremarkable reprehensibility" (Pet. App. 16a) disregards the fact that, under the law of Utah and every other jurisdiction, conduct of "unremarkable reprehensibility" would not warrant the imposition of *any* punitive damages. It also is impossible to square with this Court's observation that, as a constitutional matter, "punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is *so reprehensible* as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm I*, 538 U.S. at 419 (emphasis added). Moreover, even if the Utah Supreme Court were right about the 1:1 ratio being limited to cases of "unremarkable reprehensibility," that hardly justifies ignoring this Court's other statements about the historical tradition of 1:1 to 3:1 ratios being "instructive" and a 4:1 ratio being "close to the line" in favor of selecting the highest possible single-digit ratio.

Nor does the Utah Supreme Court's statement that the Campbells' $1 million compensatory award contains no punitive element justify such a dramatic departure from the 1:1 ratio suggested by this Court. Putting aside the impropriety of overriding this Court's express conclusion that the compensatory award did include a punitive element, this rationale for refusing to adhere to the 1:1 ratio (and instead selecting a ratio at the high end of the single-digit range) is fundamentally misguided. Whether or not the $1 million remitted compensatory award was "exclusively for actual harm sustained by the Campbells" as the Utah Supreme Court insisted (Pet. App. 15a), the fact remains that, *from State Farm's perspective*, the entire $1 million is punitive. That is because the most State Farm ever could have hoped to gain from its bad

faith failure to settle within policy limits (and corresponding fraud) was the amount of those policy limits — *i.e.*, $50,000 — a sum far smaller than the amount it ultimately paid after the Utah Supreme Court affirmed the underlying judgment (see 538 U.S. at 413-414). Because the full amount of its potential ill-gotten gain had been removed several times over by its payment of the excess verdict, *every penny of the $1 million compensatory* award served the punitive and deterrent functions of punitive damages. See *Smith v. Wade*, 461 U.S. 30, 94 (1983) (O'Connor, J., dissenting) ("awards of compensatory damages and attorney's fees already provide significant deterrence").[3]

In short, the Utah Supreme Court's rationales for deviating from the 1:1 ratio suggested by this Court are makeweight. Unfortunately, the Utah Supreme Court is far from alone in refusing to adhere to this Court's guidance on ratios.

For example, in another insurance bad faith case, the Ninth Circuit recently took a similarly defiant tack. Straining to uphold a $5 million punitive award that was 2.6 times the $1,920,849 compensatory award for past and future unpaid disability benefits and emotional distress, the court flatly asserted that "*State Farm*'s 1:1 compensatory to punitive damages ratio is not binding, no matter how factually similar the cases may be." *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1014 (9th Cir. 2004).

That was not the first time that the Ninth Circuit gave short shrift to this Court's discussion of the 1:1 ratio. In its first post-*State Farm I* decision, that court upheld a $2.6 million punitive award that was over seven times the $360,000 compensatory award for economic loss and emotional distress arising out of employment discrimination. *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003), cert.

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[3] It bears noting in this regard that the Utah courts awarded the Campbells approximately $1 million in attorneys' fees and costs above their already large compensatory and punitive awards.

denied, 124 S. Ct. 1602 (2004). Focusing solely on this Court's observation that single-digit multiples are more likely to pass constitutional muster than higher ratios, the Ninth Circuit stated: "We are aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages, and we decline to extend the law in this case." 339 F.3d at 1044.[4]

In another employment case, the Eleventh Circuit acknowledged that $500,000 emotional distress awards to each of seven white librarians who allegedly were victimized by reverse discrimination were "substantial," but nonetheless upheld punitive awards against three individual defendants that were between four and five times the compensatory damages allocated to those defendants. *Bogle v. McClure*, 332 F.3d 1347, 1362 (11th Cir. 2003), cert. dism'd, 124 S. Ct. 1168 (2004). Without making any inquiry into the extent to which the compensatory awards adequately satisfied the federal interests in deterrence and punishment, the Eleventh Circuit stated that the approximately 4:1 aggregate ratio was within "a range which the Supreme Court has found to be 'instructive,'" and therefore held that the ratio "does not indicate that the punitive damages award violates due process." *Ibid.*

Similarly, in a business tort case, the Federal Circuit held that *State Farm I* did not require it to reduce a $50 million punitive award that was more than three times the compensatory damages. *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366 (Fed. Cir. 2003), cert. denied, 124 S. Ct. 1423 (2004). The Federal Circuit's explanation well demonstrates why this Court's further guidance on ratios is

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[4] See also *Greenberg v. Paul Revere Life Ins. Co.*, 2004 WL 74630, at *2 (9th Cir. Jan. 12, 2004) (upholding $2.4 million punitive award in insurance bad faith case in which compensatory damages were $547,445.42 on ground that 4.4:1 ratio at issue was "similar to the 4:1 ratio in *BMW* and well within the 'single digit ratio' that marks the outer limits of permissible disparities"), cert. denied, 124 S. Ct. 2918 (2004).

so necessary. Focusing solely on the Court's statements that few ratios exceeding single digits will pass constitutional muster and that a ratio of more than 4:1 may be close to the line — and ignoring entirely the Court's observation that a 1:1 ratio may be the constitutional maximum when compensatory damages are substantial (as they undeniably were in *Rhone-Poulenc*) — the Federal Circuit stated:

> In this case, the proportion of punitive damages to compensatory damages does not even approach the possible threshold of constitutional impropriety. The $50 million punitive award is barely above three times the compensatory award of $15 million in this case. That ratio remains within the "[s]ingle-digit multipliers [which] are more likely to comport with due process," not even reaching the 4-to-1 ratio mentioned by the Court as a threshold where the punitive award may become suspect.

345 F.3d at 1372 (alterations in original; citation omitted).

In short, whether by rewriting this Court's discussion of the ratio guidepost, engaging in a selective reading of it, or straightforwardly denying its significance, many lower courts have effectively read out of the opinion the suggestion that a 1:1 ratio may be the constitutional maximum when compensatory damages are substantial. Indeed, of the 27 post-*State Farm I* decisions released by state and federal appellate courts in which the compensatory award or potential harm has exceeded $200,000 (and thus fairly could be said to be "substantial"), only once has a court construed *State Farm I* to necessitate a reduction to a 1:1 ratio.

In that case, which involved racial harassment in the workplace, the Eighth Circuit held that a $6,063,750 punitive award that was just over ten times the plaintiff's $600,000 compensatory award was unconstitutionally excessive and ordered a remittitur to the amount of compensatory damages, explaining:

> Mr. Williams's large compensatory award * * * militates against departing from the heartland of permissible exemplary damages. The Supreme Court has stated that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." Mr. Williams received $600,000 to compensate him for his harassment. Six hundred thousand dollars is a lot of money. Accordingly, we find that due process requires that the punitive damages award on Mr. Williams's harassment claim be remitted to $600,000.

Williams v. ConAgra Poultry Co., 2004 WL 1752583, at *8 (8th Cir. Aug. 6, 2004) (citation omitted).

Aside from *Williams*, we are aware of no case in which an appellate court confronted with a compensatory award of $200,000 or higher has ordered a remittitur to 1:1 or below on federal excessiveness grounds.[5] To the contrary, the overwhelming majority of courts — including other panels of the Eighth Circuit — have treated either 9:1 or 4:1 as a constitutional free pass. See, *e.g.*, *Stogsdill v. Healthmark Partners, L.L.C.*, 2004 WL 1636426, at *5 (8th Cir. July 23, 2004) (observing that "the compensatory damages award is substantial * * * and the punitive damages award is many times [the defendant's] net worth" and then going on to hold that, "[i]n these circumstances, the four-to-one ratio approved by the Supreme Court of Arkansas in *Sauer*, and by the U.S. Supreme Court in *Haslip*, becomes an appropriate due process maximum") (citations omitted); *Henley v. Philip Morris Inc.*, 9 Cal. Rptr. 3d 29, 73 (Cal. Ct. App.) (stating that, "where a plaintiff has been fully compensated with a substantial compensatory award, any ratio over 4 to 1 is 'close to the line'"

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[5] We are aware of one published district court case in which the court ordered a $52 million punitive award that was 2.2 times the $23,496,746 compensatory award reduced to $26,125,000. See *TVT Records v. Island Def Jam Music Group*, 279 F. Supp. 2d 413 (S.D.N.Y. 2003).

and reducing ratio from 16.7:1 to 6:1 where compensatory damages were $1.5 million), review granted, 88 P.3d 497 (Cal. 2004); *Diamond Woodworks, Inc. v. Argonaut Ins. Co.*, 135 Cal. Rptr. 2d 736, 762 (Cal. Ct. App. 2003) (concluding that *State Farm I*, *BMW*, and *Haslip* suggest that in run-of-the-mill case the outer limit of constitutionally permissible punitive damages is four times compensatory damages, and reducing ratio from 21.3:1 to 3.9:1 where compensatory damages were $258,570); *Williams v. Philip Morris Inc.*, 92 P.3d 126, 145 (Or. Ct. App. 2004) (concluding that, after "potential" harm to non-parties is considered, $79.5 million punitive award, on compensatory damages of $521,000, would "fall within *State Farm*'s 4-to-1 boundary"); *Bocci v. Key Pharms., Inc.*, 76 P.3d 669, 674-676 (Or. Ct. App.) (focusing exclusively on Court's references to single-digit and 4:1 ratios, stating that 4:1 "apparently is something of a benchmark for the United States Supreme Court," and reducing 45:1 ratio to 7:1 where compensatory damages were $500,000), modified, 79 P.3d 908 (Or. Ct. App. 2003); *Reading Radio, Inc. v. Fink*, 833 A.2d 199, 215 n.3 (Pa. Super. Ct. 2003) (perfunctorily concluding that 2.7:1 ratio does not violate due process in light of *State Farm I*'s statement on single-digit ratios, where compensatory damages were $300,000), appeal denied, 847 A.2d 1287 (Pa. 2004); *Harris v. Archer*, 134 S.W.2d 411, 438-439, 448 (Tex. Ct. App. 2004, pet. filed) (focusing exclusively on Court's references to single-digit and 4:1 ratios and reducing 7.4:1 ratio to 4:1, despite concluding that "lesser ratio" was warranted, where aggregate compensatory damages were $203,895); *Haggar Clothing Co. v. Hernandez*, 2003 WL 21982181, at *7 (Tex. Ct. App. Aug. 1, 2003, pet. filed) (focusing exclusively on Court's reference to single-digit ratios in upholding 6.7:1 ratio where compensatory damages were $210,000).[6]

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[6] See also, *e.g.*, *Eden Elec., Ltd. v. Amana Co.*, 370 F.3d 824, 829 (8th Cir. 2004) (upholding $10 million punitive award on ground that "the ratio of slightly more than 4.5:1 does not offend due process" — even

while acknowledging that "Eden's compensatory damage recovery was significant and that this is a commercial case"); *Union Pac. R.R. Co. v. Barber*, 2004 WL 352525 (Ark. Feb. 26, 2004) (quoting Court's statement about single-digit ratios, but ignoring its statement about a 1:1 ratio possibly being the maximum when compensatory damages are "substantial," in upholding $25 million punitive award that was just under 5 times the $5.1 million compensatory award), cert. pet. filed, No. 04-47 (July 7, 2004); *Advocat, Inc. v. Sauer*, 111 S.W.3d 346, 361, 363 (Ark.) (focusing exclusively on this Court's references to single-digit and 4:1 ratios in approving $21 million punitive award that was 4.2 times the $5 million remitted compensatory award), cert. denied, 124 S. Ct. 535 (2003); *Simon v. San Paolo U.S. Holding Co.*, 7 Cal. Rptr. 3d 367, 391 (Cal. Ct. App. 2003) (upholding punitive award that was 4.3 times non-compensable value of lost "benefit of the bargain" because, "[e]ven if *State Farm* had imposed a 'bright-line' ratio, 4 to 1 would be 'close to the line of constitutional impropriety,' but not presumptively unconstitutional"), review granted, 86 P.3d 881 (Cal. 2004); *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 812 (Cal. Ct. App. 2003) (deeming a 3:1 ratio to be constitutionally permissible in products-liability case in which surviving family members received almost $4.6 million in compensatory damages); *Maya B. v. Vogel*, 2004 WL 551325, at *13 (Cal. Ct. App. Mar. 22, 2004) (affirming ratio of 2:1 where compensatory damages were $790,000 in sexual assault case on ground that "single-digit multiplier was well within the discretion of the jury and trial court"); *Taylor Woodrow Homes, Inc. v. Acceptance Ins. Cos.*, 2003 WL 21224088, at *4 (Cal. Ct. App. May 28, 2003) (unpublished) (reducing 17.1:1 ratio to 3.4:1, where compensatory damages were $293,000, despite concluding that "[t]he facts here are not as bad as they were in *State Farm*"); *Borne v. Haverhill Golf & Country Club, Inc.*, 791 N.E.2d 903, 916 (Mass. Ct. App.) (invoking Court's statement that single-digit multipliers are more likely to comply with due process in upholding aggregate ratio of 3.4:1 where aggregate compensatory damages were $424,000), review denied, 795 N.E.2d 573 (Mass. 2003); *Hollock v. Erie Ins. Exch.*, 842 A.2d 409, 422 (Pa. Super. Ct. 2004) (acknowledging that 10:1 ratio exceeded *State Farm I*'s single-digit presumptive ceiling for due process, but concluding that ratio passed constitutional muster in light of defendant's reprehensible conduct (insurance bad faith), its significant wealth, and the "limited" $278,825 compensatory award); *Austin v. Specialty Transp. Servs., Inc.*, 594 S.E.2d 867, 877 (S.C. Ct. App. 2004) (focusing exclusively on Court's references to single-digit and 4:1 ratios in concluding that aggregate ratio of 2.5:1 "comport[ed] with due process" where aggregate compensatory damages were over $1 million); *Trinity Evangelical Lutheran Church & Sch.–Freistadt v. Tower Ins. Co.*, 661 N.W.2d 789, 803 (Wis.) (implicitly

Because "[t]he precise [punitive] award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff" (*State Farm I*, 538 U.S. at 425), it is not surprising that lower courts have reached different results in applying the ratio guidepost. But their near universal refusal to heed this Court's guidance regarding the circumstances in which a 1:1 ratio may be the constitutional maximum is much harder to comprehend. Review — and summary reversal — is warranted to make clear to the lower courts that the *entire* ratio discussion in *State Farm I* was meaningful and deserving of fair and honest consideration.

B. The Lower Courts Are Continuing To Either Misapply Or Give Short Shrift To The Third Guidepost.

In *State Farm I*, this Court criticized the Utah Supreme Court for ignoring the directly applicable Utah fine for violations of that State's unfair claims practices statute and instead "speculat[ing] about the loss of State Farm's business license, the disgorgement of profits, and possible imprisonment * * *." 538 U.S. at 428. In so doing, the Court no doubt intended to lay to rest the kind of result-oriented application of the third guidepost that the Utah Supreme Court had perpetrated in that case. Unfortunately, that objective has not been accomplished. Courts bent on upholding multi-million dollar punitive awards continue to ignore or misapply this guidepost as if *State Farm I* had never been decided.

The decision below is illustrative. Latching on to the fact that this Court appears to have "endorsed a punitive

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concluding that 7:1 ratio of punitive damages to $490,000 in potential harm was not suggestive of an excessive punishment), cert. denied, 124 S. Ct. 925 (2003); cf. *Smith v. Fairfax Realty, Inc.*, 82 P.3d 1064, 1075 (Utah 2003) (deeming federal excessiveness issue waived, but nonetheless upholding $5.5 million punitive award that was 5.5 times the compensatory damages as being "well within the single-digit ratio discussed by the Supreme Court in" *State Farm I*), cert. denied, 124 S. Ct. 1716 (2004).

damages award of $1 million, which is one hundred times greater than the $10,000 fine" established by the Utah legislature for violations of Utah's Unfair Claims Practices Act, the Utah Supreme Court reasoned that a 100:1 ratio "does not offend due process." Pet. App. 17a. It then leaped to the conclusion that a ratio of 902:1 between the punitive damages award and the maximum penalty would likewise comport with due process. *Id.* at 17a, 18a. However, that bit of logical legerdemain not only drains the third guidepost of any constraining force, but also is affirmatively inconsistent with *BMW*, in which the Court concluded that a disparity of 1,000:1 was an indication that the punitive award at issue was grossly excessive. See 517 U.S. at 584.

Regrettably, once again, the Utah Supreme Court is far from alone in attempting to eviscerate the third guidepost as a meaningful constraint. In another insurance bad faith case, the Ninth Circuit used *precisely* the same rationale that this Court rejected in *State Farm I*. Ignoring the fact that the plaintiff's $2.4 million punitive award was 480 times the maximum civil fine for violating Arizona's proscription against unfair claims settlement practices, the court held that the award did not run afoul of the third guidepost because the "possible civil sanctions for this type of conduct include the suspension or revocation of an insurer's licenses, which in this case could be worth hundreds of millions of dollars to Paul Revere." *Greenberg*, 2004 WL 74630, at *2. See also *Myers v. Workmen's Auto Ins. Co.*, 2004 WL 1636753 (Idaho July 23, 2004) (comparing $300,000 punitive award against insurance company for failure to settle plaintiff's accident claim to loss of licensure under the Idaho Trade Practices and Frauds Act).

The Seventh Circuit similarly speculated, in a case involving hotel guests who had been bitten by bedbugs, that the defendant hotel "would prefer to pay the punitive damages assessed in this case than to lose its license" due to "unsanitary conditions," which was theoretically authorized under

municipal safety statutes. *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003).

Other courts have taken the wind out of the third guidepost by comparing the punitive award before them to the hypothetical maximum fine that could be imposed under any circumstance, without considering the character of the specific conduct at issue, actual fining practice, or both. For example, in a case involving a grade-crossing accident allegedly caused by a railroad's failure to remove vegetation that was reducing sight lines, the Arkansas Supreme Court held that a $25 million punitive award passed muster under the third guidepost because it was "comparable" to "the total civil penalties authorized by law," which it determined to be $10,082,500 by adding together the maximum daily state and federal fines for overgrown vegetation ($500 and $20,000 per day, respectively) and treating each day as a separate violation. *Barber*, 2004 WL 352525. That measure of the comparable fine, however, is wildly unrealistic. The *total* amount of fines collected by the Federal Railroad Administration from *all* railroads in America for *all* safety violations (excluding hazardous materials) for the year following the accident was only $4.3 million. See Federal Railroad Administration, Office of Chief Counsel, *Railroad Safety Civil Penalty Cases Closed During Fiscal Year 1999* (Jan. 31, 2000). The penalty that would realistically be imposed for overgrown vegetation at a single crossing was certainly much less, and far from the $25 million that the jury awarded.

Similarly, in holding that a $4.5 *billion* punitive award was constitutionally permissible, a federal district court in Alaska ignored the fact that the actual fines paid by Exxon in connection with the grounding of the *Exxon Valdez* in Prince William Sound were $125 million, on the ground that Exxon *could have been fined* $5.1 *billion* had it been convicted of five criminal offenses and made to pay "twice the gross pecuniary loss" for each of them. *In re Exxon Valdez*, 296

F. Supp. 2d 1071, 1107-1109 (D. Alaska 2004) (internal quotation marks and alterations omitted.

Many other courts have either ignored or refused to give weight to the third guidepost, even when there is a readily available fine with which to compare the punitive award. See, *e.g.*, *Hangarter*, 373 F.3d at 1015 (upholding $5 million punitive award in insurance bad faith case without even acknowledging that fine for violation of California's unfair claim practices statute was $10,000); *Hollock*, 842 A.2d at 422 ($2.8 million punitive award was not "unjustified" in light of "potentially harsh penalties" that could be imposed on insurer for unfair claims handling — $5,000 per-violation fine and suspension of its license); *Trinity Evangelical*, 661 N.W.2d at 803 (refusing to give weight to Wisconsin's $10,000 criminal penalty for unfair insurance claim settlement practices on ground that the Court indicated in *State Farm I* that criminal penalties have "less utility").

Review is badly needed to correct — once and for all — the pervasive refusal among the lower courts to apply the third guidepost in a principled fashion. In too many situations, including the present case, the third guidepost has ceased to perform its function as a constraining force.

CONCLUSION

The petition for a writ of certiorari should be granted, and the Court should summarily reverse the decision below.

Respectfully submitted.

JAN S. AMUNDSON
QUENTIN RIEGEL
National Association of Manufacturers
1331 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 637-3000

ANDREW L. FREY
Counsel of Record
EVAN M. TAGER
Mayer, Brown, Rowe & Maw LLP
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Counsel for the Amicus Curiae

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